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Nos. 07-1078, 07-1059

FILED

IN THE

Supreme Court of the United States

USEC INC. and
UNITED STATES ENRICHMENT CORPORATION,

Petitioners,

v.

EURODIF S.A.; COMPAGNIE GENERALE DES MATIERES NUCLEAIRES; COGEMA, INC.; and AD HOC UTILITIES GROUP,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR PETITIONERS USEC INC. AND UNITED STATES ENRICHMENT CORPORATION

Of Counsel:

PETER B. SABA
General Counsel
JAMES A. SCHOETTLER, JR.
Assistant General Counsel
USEC Inc.

H. BARTOW FARR III
FARR & TARANTO
1150 18th Street, N.W.
Suite 1030
Washington, D.C. 20036

SHELDON E. HOCHBERG
Counsel of Record
ERIC C. EMERSON
CHARLES G. COLE
MICHAEL A. VATIS
JOHN P. NOLAN
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

Attorneys for Petitioners
USEC Inc. and United States
Enrichment Corporation

216381

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

The antidumping law allows for duties to be imposed on "foreign merchandise . . . sold in the United States at less than its fair value." The Commerce Department construed that phrase as including transactions in which a U.S. customer furnishes cash and fungible raw material to a foreign producer and receives a substantially transformed finished product. The question presented in this case is whether the Federal Circuit erred in failing to accord *Chevron* deference to that construction, when a contrary one will prevent the Commerce Department from applying the antidumping law to imports causing or threatening material injury to a domestic industry.

PETITION RULE 29.6 STATEMENT

The corporate disclosure statement contained in USEC's Petition for Writ of Certiorari, Pet. ii, remains accurate.

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OPINIONS BELOW

The final judgment of the court of appeals is reported at 506 F.3d 1051 and reprinted in the Appendix to USEC's Petition at 31a.

The question presented by this petition was raised and decided on interlocutory appeal; the court of appeals' judgment on interlocutory appeal is reported at 411 F.3d 1355 (USEC Pet. 1a), affirmed on rehearing at 423 F.3d 1275 (USEC Pet. 24a). The decision of the U.S. Court of International Trade from which interlocutory appeal was taken is reported at 281 F. Supp. 2d 1334 (USEC Pet. 268a). The Department of Commerce's original determination is reported at 66 Fed. Reg. 65,877 (USEC Pet. 41a), and its redetermination following initial judicial review, USEC Pet. 147a, is available at http://ia.ita.doc.gov/remands/03-34.pdf.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2000).

STATUTORY PROVISIONS INVOLVED

Section 1673 of Title 19, U.S. Code (2000), provides in relevant part that:

> If—
>
> (1) the administering authority [the Department of Commerce] determines that a

class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and

(2) the [U.S. International Trade] Commission determines that—

(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded,

by reason of imports of that merchandise, or by reason of sales (or the likelihood of sales) of that merchandise for importation, then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise. For purposes of this section and section 1673d(b)(1) of this title, a reference to the sale of foreign merchandise includes the entering into of any leasing arrangement regarding the merchandise that is equivalent to the sale of the merchandise.

STATEMENT OF THE CASE

Petitioner USEC Inc., through its wholly-owned subsidiary United States Enrichment Corporation (collectively USEC), is the sole domestic producer of low enriched uranium (LEU). USEC has been injured by unfairly priced imports of LEU produced by respondent Eurodif S.A. (Eurodif). In some of these import transactions, the U.S. customer paid Eurodif cash that reflects the entire value of the LEU. In other transactions where the customer received LEU, the customer paid cash and also supplied a quantity of unenriched uranium. There is no difference in the LEU delivered under either form of transaction, or in the manner in which the LEU is produced. Eurodif produces all LEU from fungible inventories of unenriched uranium. Thus, the LEU received by a customer is not produced from the specific raw material supplied by that customer.

Upon USEC's petition, the Department of Commerce (Commerce or the Department) concluded that all of these import transactions constituted sales of LEU under the antidumping law, and the United States International Trade Commission (the Commission) found that the domestic enrichment industry had been injured by Eurodif's imports. The Commerce Department issued an order imposing offsetting antidumping duties. The Federal Circuit, however, reversed Commerce's determination. It concluded that those transactions in which the customer supplied Eurodif with unenriched uranium involved sales of services, not sales of merchandise, and therefore were outside the scope of the antidumping law.

This case raises the question whether the Commerce Department can reasonably determine that foreign merchandise has been "sold" within the meaning of the antidumping law where a U.S. customer furnishes cash and fungible raw material to a foreign producer and, in return, receives a substantially transformed product (*i.e.*, a new and different article of commerce).

I. STATUTORY BACKGROUND

"Dumping" describes the practice of international price discrimination whereby a producer or exporter sells merchandise in an export market at less than fair value. The U.S. antidumping statutory framework is embodied in the Tariff Act of 1930, *as amended* (the Act). The Act states that "dumping" "refer[s] to the sale or likely sale of goods at less than fair value." 19 U.S.C. § 1677(34) (2000).[1] The Act provides that, when "foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value," and when imports or sales of such merchandise cause or threaten to cause material injury to an industry in the United States, antidumping duties shall be imposed on imports of that merchandise. *Id.* § 1673.

The Commerce Department and the Commission are jointly responsible for administering the antidumping law. Commerce determines whether foreign merchandise is being sold in the United States at less than its fair value, *id.* §§ 1673(1), 1677(1), and the Commission determines whether a domestic industry

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[1] Unless otherwise indicated, all references to the United States Code are to Title 19 of the 2000 edition.

producing a product like the imported merchandise has been materially injured or threatened with material injury by reason of imports of that product. *Id.* §§ 1673(2), 1677(7) & (10). Upon the filing of a petition by an affected domestic industry, each agency conducts its own investigation, and if both agencies make affirmative final determinations, Commerce will issue an antidumping duty order. *Id.* § 1673d(c)(2).

In its investigation, Commerce calculates a dumping margin based on the "normal value," which is generally determined by reference to the prices at which the producer or exporter sells the same goods in its home market or in third country markets. If there are no appropriate home or third country market sales, the Department determines normal value by calculating the constructed value of the merchandise (*i.e.*, the cost of producing the subject merchandise, including selling, general, and administrative expenses and profit). The dumping margin is the amount by which the normal value exceeds the U.S. price of the subject merchandise. *Id.* § 1677(35)(A). Importers of merchandise subject to an antidumping duty order must then pay cash deposits in the amount of this dumping margin when entering that merchandise into the United States. *Id.* § 1673e(a)(3). The actual amount of duty owed on particular imports is determined retrospectively through administrative reviews that may be requested on an annual basis. *Id.* § 1675(a).

II. FACTUAL BACKGROUND

A. The Production of LEU

Nuclear power plants use fuel rods fabricated from low enriched uranium (LEU) to produce electricity. LEU does not exist in a natural state, but must be produced through a multi-stage process.

Only one uranium isotope is fissionable—U_{235}. Its concentration in natural uranium is only 0.711 percent by weight. Most nuclear utilities require fabricated fuel with a U_{235} concentration ("assay") in the range of 3 to 5% by weight. Enrichment is the manufacturing process by which the level of fissionable U_{235} is increased to these levels. J.A.-40-43. Uranium in which the U_{235} assay has been enriched to a level of 20% or more is weapons-grade material and is referred to as "highly enriched uranium" or "HEU."

Uranium moves through several stages before it is enriched. After the uranium ore is mined, it is then milled or refined into uranium concentrate (U_3O_8), and then converted into uranium hexafluoride (UF_6). The UF_6 (referred to as "unenriched uranium" or "feed uranium") is then enriched. *See* USEC Pet. 102a-103a. It is the enrichment that results in the uranium reaching a fissionable form.

Both USEC and Eurodif use the gaseous diffusion method for producing LEU. Their plants are among the largest manufacturing facilities of any kind in the world, and require enormous amounts of electricity to operate. The gaseous diffusion process involves continuously

forcing and recycling uranium hexafluoride gas under pressure through hundreds of cascades, each of which contains porous membranes. As the U_{235} molecules are lighter than the other molecules, the process results in two streams of gas, one enriched in U_{235} (the LEU) and one that is somewhat depleted in U_{235} (the "tails"). J.A.-40-43.

The laws of physics permit the calculation of the separative effort required to produce LEU at a given U_{235} concentration (or assay) and a tails stream of a given U_{235} assay from a particular quantity of unenriched uranium. That effort is measured in terms of "separative work units" (or SWU) and is calculated using an industry-standard formula. USEC Pet. 104a.[2]

B. Enrichers

The United States has only one plant in operation that produces LEU for nuclear fuel used in generating electricity. This plant, located in Paducah, Kentucky, is owned by the U.S. government. It is operated by USEC pursuant to a lease with the Department of Energy transferred to USEC pursuant to the USEC Privatization Act of 1996, 42 U.S.C. § 2297h. Prior to the 1998 privatization of USEC, the enrichment facilities were operated under this same lease by USEC's predecessor, a federal corporation known as the United

[2] The industry-standard formula is set out as an appendix to the SWU contracts in the Joint Appendix, *e.g.*, C.J.A.-48. The amount of SWU determined by the formula to be required for a particular quantity and assay of LEU is the same irrespective of how the LEU is produced (*e.g.*, whether through the gaseous diffusion process used by USEC and Eurodif, or the centrifuge process used by other enrichers).

States Enrichment Corporation. The facilities themselves were built in the 1950's by the U.S. government and were operated by the Atomic Energy Commission, and later the Department of Energy, to serve U.S. national and energy security interests that are still important today.

Eurodif S.A., the enricher in France, is 60% owned by AREVA NC (formerly named Compagnie Générale Des Matières Nucléaires, or COGEMA). AREVA NC is a wholly owned subsidiary of AREVA S.A. Affiliates of AREVA S.A. are engaged in the mining, conversion, and enrichment phases of the production of nuclear fuel. Approximately 84% of AREVA S.A. is owned, directly or indirectly, by the Government of France.

C. Contractual Arrangements For LEU

Enrichers and their utility customers generally enter into two types of contracts: "EUP" contracts (which refers to enriched uranium product contracts) or "SWU" contracts (which refers to "uranium enrichment services contracts"). These contracts typically cover deliveries of LEU over a period of years. In many regards, the provisions in EUP contracts and SWU contracts are similar (*compare* the SWU contract at C.J.A.-1-67 *and* the EUP contract at C.J.A.-325-377). There is no difference in the LEU that is delivered to customers pursuant to either type of contract, or in how the LEU is produced. They are simply alternative arrangements by which utilities can obtain the LEU they need.

In an EUP transaction, the utility obtains LEU and pays a cash price that covers the entire value of the

LEU, including both the uranium and enrichment components. There is no dispute that LEU imports pursuant to EUP contracts involve sales of merchandise subject to the antidumping law.

In a SWU transaction, the utility obtains LEU and furnishes unenriched uranium to the enricher as well as cash. The amount of cash paid is based on the number of SWUs deemed to be contained in the LEU delivered (as calculated using the industry-standard formula discussed above), and the price per SWU as specified in the SWU contract. The utility under both EUP and SWU contracts specifies the amount of LEU and the level of concentration (or assay) of the LEU to be delivered, whether in the contract itself or in purchase orders submitted to the enricher during the term of the contract. Under a SWU contract, however, the customer may select the mix of unenriched uranium and cash (within a range allowed by the enricher) that it provides in exchange for the LEU.

Irrespective of the mix of cash and unenriched uranium that customers provide to the enricher, the enricher has total control over how it actually produces LEU. The enricher must provide the amount of LEU at the U_{235} assay specified by the customer, but it is not required to do so using the proportions of SWU and unenriched uranium chosen by the utility as the basis for its obligations to the enricher. The enricher decides how best to operate its plant according to its own economics (*e.g.*, its cost of electricity, which is a significant cost factor for a gaseous diffusion plant), and its perception of the value of unenriched uranium. For example, the enricher may produce LEU using more

unenriched uranium than is provided by its customers (but less electricity), a practice known as "over-feeding." Alternatively, an enricher may use less unenriched uranium than is supplied by its customers (thereby generating additional inventory of unenriched uranium for itself), but will have to purchase additional electricity to produce LEU for its customers ("under-feeding"). Either way, as long as the customers receive the LEU specified in their contracts or purchase orders, the enricher has met its obligations.

The SWU contracts in this case also contain provisions stating that the utility customer has title to the unenriched uranium it supplies until the enricher delivers the LEU. Some contracts provide that the title to the unenriched uranium is deemed extinguished when the LEU is delivered. Some say nothing about what happens. *Compare* C.J.A.-17 and C.J.A.-87; *see also* USEC Pet. 218a.

There is no requirement in a SWU contract that the LEU be produced from the unenriched uranium delivered by the customer. In fact, because all unenriched uranium is fungible and because U_{235} and other molecules are constantly being re-circulated through the cascades of the plant, the LEU delivered to a customer is not produced from the unenriched uranium delivered by that customer. Enrichers continuously produce LEU from their fungible inventory of unenriched uranium for delivery under both SWU and EUP contracts. The LEU delivered by an enricher may have been produced even before the utility provided any unenriched uranium or even before the order for the LEU was placed. USEC Pet. 49a, 219a. Indeed, the enricher need not actually perform any

enrichment. An enricher meets its contractual obligations under a SWU contract by delivering the requisite quantity of LEU at the specified product assay, even if the enricher obtains that LEU from another party. J.A.-229. Or, under SWU contracts an enricher can provide its customers with LEU that has been down-blended from highly enriched uranium, such as HEU in nuclear weapons. USEC Pet. 33.

D. Delivery Of LEU To U.S. Customers

LEU that is ultimately going to be delivered to a U.S. utility customer is generally first shipped to one of several fabricators in the United States. The fabricator creates the nuclear fuel rods that can be utilized in nuclear reactors. Enrichers maintain accounts at the fabricators and the LEU shipped by an enricher to a fabricator is recorded to the enricher's account on the fabricator's books. C.J.A.-470-71, 492.

During the period covered by Commerce's antidumping investigation, all deliveries of French LEU to U.S. utility customers were effected by transfers on the books of U.S. fabricators. C.J.A.-548. That is, on the date Eurodif was to deliver the LEU to the utility customer, a transfer was effected on the books of the fabricator by debiting the AREVA account and crediting the account of the utility customer with the amount of LEU to be delivered. This method of delivery was followed with respect to LEU delivered pursuant to SWU contracts as well as EUP contracts.

III. THE PROCEEDINGS BELOW

A. The Commerce Proceedings

USEC initiated these proceedings by filing petitions with the Commerce Department and the Commission. Following a year-long investigation, Commerce issued its final determination. USEC Pet. 41a, *as amended*, USEC Pet. 90a (collectively Final Determination). The Department found that LEU from France was being sold in the United States at less than fair value. In addition, the Commission determined that these imports were causing injury to the domestic uranium enrichment industry. As a result of these determinations, Commerce issued an antidumping duty order with regard to imports of French LEU.

A central issue in the antidumping proceeding before Commerce was whether LEU imports pursuant to SWU contracts constituted sales of merchandise, subject to the antidumping law, or sales of services, outside the scope of that law. Because of the importance of this issue, Commerce asked for separate briefing and held a separate hearing on this issue.

Commerce concluded that all LEU entering the United States from France was subject to the antidumping law "regardless of the way in which the sales for such merchandise were structured." USEC Pet. 47a; *see also id.* 54a. Noting that "no party disputes that the LEU entering the United States constitutes merchandise," *id.* 52a, Commerce found that LEU is the product of a "major manufacturing operation," and that enrichment constitutes "substantial transformation" of

the uranium feedstock, thereby creating a "new and different article of commerce." *Id.* 52a, 62a-63a.

Commerce reasoned that "the unfair trade laws must be applicable to merchandise produced through contract manufacturing, just as they are applicable to merchandise manufactured by a single entity. To do otherwise would contravene the intent of Congress by undermining the effectiveness of the AD and CVD laws . . . ." USEC Pet. 63a. It rejected the notion that a SWU contract involved only a sale of services, and not a sale of goods subject to the antidumping laws: "We simply do not consider a major manufacturing process to be a 'service' in the same sense that activities such as accounting, banking, insurance, transportation and legal counsel are considered by the international trading community to be services." *Id.* 64a. Commerce expressed the concern that a contrary conclusion would allow foreign producers and U.S. customers to "convert trade in goods into trade in so-called 'manufacturing services,'" thereby creating a serious loophole in the antidumping law that would "expos[e] industries to injury by unfair trade practices without the remedy" provided by that law. *Id.* 63a.

Accordingly, Commerce applied the antidumping order to all imports of LEU from France, including imports pursuant to SWU contracts.

B. CIT Review And Commerce's Redetermination

Eurodif and the Ad Hoc Utilities Group (AHUG), an association of U.S. utilities, contested the Final

Determination before the CIT. They argued that SWU contracts involved sales of services outside the antidumping law relying, in part, on Commerce's "tolling" regulation, 19 C.F.R. § 351.401(h) (2008). In a tolling arrangement, one party (the tollee) arranges for merchandise to be produced by another party (the toller), and pays for that contract manufacturing. The tolling regulation provided guidance as to which entity's prices and costs (*i.e.*, the toller's or the tollee's) would be examined in determining dumping margins.[3]

The CIT agreed with Commerce that the tolling regulation did not exempt imported merchandise from antidumping proceedings or orders. USEC Pet. 131a. Nevertheless, the CIT remanded the case for reconsideration of how the tolling regulation might affect the Department's conclusion that transactions under SWU contracts involved a sale of goods, not services.

On remand, the Department considered both the tolling regulation and its prior precedent. USEC Pet. 147a-148a. The Department found that the tolling regulation was inapplicable because it was designed to be used only where the tollee made a subsequent sale from which the price of merchandise could be obtained.

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[3] Commerce has recently revoked the regulation, explaining that the CIT's application of the regulation in this case on the issue whether U.S. utilities are foreign producers of LEU was contrary to the Department's intention in issuing the regulation and inconsistent with the Department's mandate to protect domestic industries suffering material injury from unfairly traded imports. Withdrawal of Regulations Governing the Treatment of Subcontractors ("Tolling Operations"), 73 Fed. Reg. 16,517 (Dep't Commerce Mar. 28, 2008).

It did not apply here, where the tollee imported the product for its own consumption. Further, the Department found that the SWU transactions were the relevant sales of goods from which an appropriate price could be obtained to calculate dumping margins.

In this context, Commerce explained why imports pursuant to SWU contracts constituted sales of goods. First, they involve "the transfer of ownership [from the enricher to the utility] in the complete LEU product for consideration . . . ." *Id.* 217a. Prior to the delivery of the LEU, "[t]he customer does not hold title to the LEU, nor does she hold title to the feed material contained within the recently produced LEU because the LEU produced by the enricher cannot be identified as having been derived from the feedstock provided by any particular customer." *Id.* 219a.

Commerce went on to explain that the enricher "hold[s] inventories of uranium from various sources, including uranium owned by the enricher itself, and produce[s] LEU without relying solely upon the input from a particular customer." *Id.* 221a. Commerce found:

> [T]he record indicates that LEU delivered to a utility customer by an enricher under an enrichment contract may be produced before any natural uranium supplied by that customer could have been part of the production process for that LEU, thereby making it impossible to conclude that the LEU produced and delivered by the enricher is in any way derived from the uranium supplied by the customer.

Id. 219a. Based upon these factors, Commerce concluded that "between the time in which the LEU is produced and the time in which it is delivered," the enricher "holds ownership" in the LEU and "the utility customers have no right of ownership with respect to the LEU that is produced, but not delivered . . . ." *Id.*

The CIT, on review, rejected the Department's conclusion. *Id.* 268a. The CIT focused exclusively on the terms of the SWU contracts, particularly the provision that the utility retains title to the feed uranium, rather than examining the total evidence of record considered by the Department. The CIT found that the contracts create a "legal fiction" that the uranium feed delivered by the utility is enriched by the enricher and returned as LEU to the utility, and "suggest an intention to establish a continuous chain of ownership in the utility . . . ." *Id.* 277a. In the CIT's view, regardless of the facts of the enrichment process and how SWU transactions are implemented, "the contracts delineate a transaction in which a utility provides raw material to an enricher, pays for the service of processing the material, and obtains the finished product after the manufacturing service has been performed." *Id.* 278a.

C. Interlocutory Federal Circuit Decisions

On interlocutory appeal, the Federal Circuit affirmed. USEC Pet. 1a (*Eurodif I*). In evaluating what it referred to as "[t]he [c]haracterization of [e]nrichment [c]ontracts," *id.* 12a, the Federal Circuit relied on a previous decision in which it had been called upon to characterize Department of Energy enrichment contracts under a different statute, the Contract

Disputes Act, 41 U.S.C. §§ 601, *et seq.* (1988) (CDA), to determine whether interest was payable on certain judgments against the United States, *Florida Power & Light Co. v. United States*, 307 F.3d 1364 (Fed. Cir. 2002). In that case, the court had agreed with the government's argument that contracts for the enrichment of uranium by the Department of Energy were contracts for services, not contracts "for the disposal of personal property" and, hence, not covered by the CDA. *Id.* at 1373. The court below extended *Florida Power's* contract-based approach to this case. "In reviewing the contracts in this case, it is clear that ownership of either the natural uranium or the LEU is not meant to be vested in the enricher during the relevant time periods that the uranium is being enriched." USEC Pet. 15a. "As a result, the 'transfer of ownership' required for a sale under [*NSK Ltd. v. United States*, 115 F.3d 965 (Fed. Cir. 1997)] is not present here." *Id.*

USEC and the United States then sought rehearing and rehearing *en banc*, in part based on the court's improper reliance on *Florida Power* as a basis for failing to defer to Commerce's construction of the antidumping statute. The Federal Circuit denied rehearing *en banc*, but granted rehearing for the limited purpose of addressing the applicability of *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), which had been handed down after *Eurodif I*. USEC Pet. 24a (*Eurodif II*). While acknowledging that, under *Brand X*, deference would be due to Commerce if the antidumping statute were ambiguous, the court stated, "We now clarify . . . that the antidumping statute unambiguously applies to the sale of goods and not services." *Id.* 28a.

D. Subsequent Proceedings

On remand, Commerce adopted language limiting the scope of the French antidumping order in accordance with the Federal Circuit's decision. USEC Pet. 340a. The CIT affirmed. *Id.* 356a. The United States and USEC appealed to the Federal Circuit, raising certain issues in connection with the changes in the scope of the order. The Federal Circuit concluded that both appeals raised issues that could best be resolved when particular facts were at issue, and dismissed them as unripe. *Id.* 31a.

With the Federal Circuit's dismissal of the appeals, the Federal Circuit's interlocutory decisions in *Eurodif I* and *Eurodif II* became incorporated in a final judgment. Both USEC and the United States filed petitions for certiorari. The Court granted review on April 21, 2008, and consolidated the cases.

E. Proceedings Regarding Imports of Russian LEU

As noted in USEC's petition, the impact of the Federal Circuit's decision is already being felt in another important antidumping case involving uranium imports from Russia. USEC Pet. at 16-17, 19, 33-35. Those imports are currently limited by a 1992 agreement between the United States and Russia suspending an antidumping investigation. The agreement limits Russian exports of commercially produced LEU. Those limits are essential in encouraging Russia to fulfill a related 1993 disarmament agreement. Pursuant to that 1993 agreement, Russia is dismantling 20,000 nuclear weapons of the former Soviet Union, down-blending the

HEU in those weapons to LEU, and then exporting the LEU to the United States. Imports of this form of Russian LEU are permitted by the 1992 suspension agreement. USEC acts as Executive Agent for the United States in compensating Russia and supplying that LEU to U.S. customers under their EUP and SWU contracts with USEC. If Russia can use its sizable enrichment facilities to manufacture and export commercial LEU under SWU contracts outside the scope of the antidumping law, it will have little incentive to deliver LEU created by the down-blending of nuclear weapons.

In late 2007, and in light of the Federal Circuit's decisions in *Eurodif*, the CIT directed Commerce to exclude imports pursuant to SWU contracts from the scope of that case. *Techsnabexport v. United States*, 515 F. Supp. 2d 1363 (Ct. Int'l Trade 2007). If such a decision were implemented, the limits on Russian commercial LEU under the 1992 agreement would no longer be effective. On June 10, 2008, the CIT stayed further proceedings in that case pending the outcome of this Court's review of the *Eurodif* decision.

SUMMARY OF ARGUMENT

We begin with a point of common ground: all parties to this case acknowledge that the antidumping statute applies to an import transaction in which a foreign enricher takes its own uranium feedstock, manufactures it into LEU, and then delivers the LEU to a U.S. utility in exchange for cash. If, in that kind of transaction (known as an EUP transaction), the price paid is less than fair value, then it is precisely the sort of unfair

import practice that the statute was meant to address. By virtue of the transaction, "merchandise" (LEU) "is being . . . sold" by the enricher to the utility at a price that does not reflect its fair value, thereby exposing domestic competitors to the potential loss of business, and attendant loss of jobs, that result from artificially skewed competitive conditions. *See, e.g., Koyo Seiko Co. v. United States*, 20 F.3d 1156, 1159 (Fed. Cir. 1994).

From that starting point, the Commerce Department has determined that the application of the antidumping law should be no different when a utility obtains LEU in a transaction pursuant to a SWU contract, which differs factually from an EUP transaction in one primary respect: in a SWU transaction the customer must supply unenriched uranium to the enricher, as well as cash. The Department recognized that, insofar as the objectives of the antidumping act are concerned, the two transactions are essentially the same. In each situation, the parties enter into a course of dealing by which the enricher delivers, and the utility receives, "merchandise" (LEU). And, most pointedly, unfairly priced imports of LEU under either form of contract can injure the domestic industry (here, USEC, currently the sole domestic producer of LEU) that competes with the foreign producers.

Focusing on the language and purpose of the antidumping statute and the realities of the transactions, the Department concluded that SWU transactions constitute sales of merchandise under that statute. It relied on two essential elements of SWU transactions that are also pertinent to EUP

transactions: (1) the enricher produces and delivers to the customer a new, substantially transformed product (LEU); and (2) the LEU is produced from fungible, commingled raw materials and not from the feedstock actually supplied by the customer.

Refusing to accord deference to the Department under *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), however, the Federal Circuit held that the agency's construction of the statutory language was impermissible. According to the court of appeals, merchandise is only "sold" when there is a "transfer of ownership," and, as the parties to SWU transactions have structured their contracts, no "transfer of ownership" in the relevant merchandise (LEU) ever takes place. It thus decided that the Department had failed the first part of the *Chevron* test because its interpretation was foreclosed by unambiguous language in the statute.

This analysis is faulty on several grounds. To begin with, the Department, in the exercise of its assigned responsibilities under the antidumping act, was not required to adopt the common commercial definition of the word "sold," but could properly read the term more expansively in light of the statutory context. *See, e.g., Dist. Of Columbia v. Carter*, 409 U.S. 418, 420 (1973). Moreover, even if the definition used by the Federal Circuit is controlling, that language would not foreclose the Department from finding that, based on the facts of the parties' actual dealings rather than their contractual arrangements, a "transfer of ownership" in the LEU occurs. Under either view of the word "sold," therefore, Congress has not "unambiguously forbid[den] the

Agency's interpretation," *Barnhart v. Walton*, 535 U.S. 212, 218 (2002), and the interpretation must be upheld unless it, "for other reasons, exceeds the bounds of the permissible." *Id.*

The Department's interpretation readily meets that standard. It was entirely reasonable for the Department to conclude that, for purposes of the Act, the enricher in a SWU transaction "sells" the LEU that it delivers, just as it does when it delivers LEU in a EUP transaction. It is undisputed that, in both SWU and EUP transactions, the enricher does not make LEU from any particular feedstock but instead produces LEU from its fungible feedstock inventory. As a result, it is just a "legal fiction," USEC Pet. 27a, that the utility ever "owns" the specific feedstock actually used in producing the LEU that it ultimately receives. The Department was not bound to observe that "fiction," or to give it controlling effect (as the court of appeals did).

Indeed, the link between any fungible, non-identifiable feedstock and the final LEU merchandise is made even more attenuated by the fact that the feedstock must be "substantially transformed" in order to become LEU. Thus, the delivered LEU is not just an improved or "serviced" version of the feedstock which is then returned to the customer—like a suit given a dry cleaning—but rather reflects the production of an entirely new article of merchandise. As it does in an EUP transaction, the enricher in a SWU transaction draws upon a fungible inventory of unenriched uranium and creates a new product that it subsequently transfers for consideration. Nothing about the fact that, in a SWU transaction, the utility at some point contributes to the

enricher's undifferentiated inventory of feedstock, requires that the final step, *i.e.*, the transfer of LEU to the utility, be treated differently as a matter of law under the antidumping statute. Indeed, Commerce's focus on the fact that enrichers substantially transform uranium feedstock into new and different merchandise effectuates the purpose of the antidumping law—to protect domestic producers from imports of foreign-produced goods at unfair prices.

The court below refused to defer to Commerce's construction of the statute because it gave conclusive effect to the provision in SWU contracts that the utility customer retains title to the unenriched uranium it delivers to the enricher. It is well-established, however, that, in applying regulatory statutes, federal courts and agencies are not bound by either the form given by the parties to their transactions or the treatment of those transactions for purposes of commercial law. *See, e.g.*, *United Gas Improvement Co. v. Cont'l Oil Co.*, 381 U.S. 392, 399-400 (1965). Indeed, with respect to the antidumping statute itself, Congress made clear in 1984 that whether title to imported merchandise is retained by the foreign producer in a transaction structured as a lease is not determinative of whether foreign merchandise "is being . . . sold" for purposes of the Act. The Department simply followed those principles in concluding that, the parties' arrangements about title notwithstanding, the transactions in question here constituted sales of merchandise.

The Department's interpretation also avoids an undesirable loophole in the antidumping law. If the Federal Circuit were correct that the parties' contractual

arrangements controlled whether merchandise is "sold" under the statute, it would allow foreign producers and domestic consumers to draft contracts that, without materially changing the substance of their dealings, converted sales of goods into sales of services instead. The Department reasonably blocked off that potential loophole, and the Federal Circuit exceeded its judicial authority in setting that determination aside.

ARGUMENT

I. THE COMMERCE DEPARTMENT IS THE EXPERT AGENCY CHARGED WITH ADMINISTERING THE ANTIDUMPING LAW, AND ITS INTERPRETATIONS ARE ENTITLED TO DEFERENCE UNLESS THEY ARE FORECLOSED BY THE STATUTE OR OTHERWISE IMPERMISSIBLE.

This Court has stated that "'[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'" *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). Where Congress has not "directly spoken to the precise question at issue," *id.* at 842, a court must defer to a "permissible construction of the statute" by the agency. *Id.* at 843 (citation omitted). As this Court reaffirmed in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), "[i]f a statute is ambiguous, and if the implementing agency's

construction is reasonable, *Chevron* requires a federal court to accept the agency's construction . . . even if the agency's reading differs from what the court believes is the best statutory interpretation." *Id.* at 980. "[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S. at 844.

The Court has explained that this judicial deference rests upon several important understandings. In *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), the Court stated that "[w]e accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left an ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Id.* at 740-41; *see also Brand X Internet Servs.*, 545 U.S. at 982 ("*Chevron's* premise is that it is for agencies, not courts, to fill statutory gaps."). The Court has also remarked that "judgments about the way the real world works . . . are precisely the kind that agencies are better equipped to make than courts," *PBGC v. LTV Corp.*, 496 U.S. 633, 651 (1990), adding that "practical agency expertise is one of the principal justifications behind *Chevron* deference." *Id.* at 651-52 (citing *Chevron*, 467 U.S. at 865).

For its interpretations to receive *Chevron* deference, of course, the agency must be construing a "statute which it administers," *Chevron*, 467 U.S. at 842, but that is plainly the case here. Section 1673, by its terms, looks to whether "(1) the administering authority [*i.e.*, the

Department of Commerce under 19 U.S.C. § 1677(1)] determines that . . . foreign merchandise is being, or is likely to be sold in the United States at less than its fair value." Carrying out that responsibility, the Commerce Department engages in dozens of antidumping proceedings annually, in which it is called upon to apply that law to myriad complex transactions for the production and importation of foreign-produced merchandise. "Commerce's special expertise makes it the 'master' of the anti-dumping law, entitling its decisions to great deference from the courts." *F.lli Filippo S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000).

This Court has also made clear that *Chevron* deference applies to constructions of statutory provisions developed by an agency in adjudications, as it does when the construction is adopted in rulemaking proceedings. *United States v. Mead Corp.*, 533 U.S. 218 (2001). Following that principle, the Federal Circuit has acknowledged that interpretations of the antidumping statute rendered by the Commerce Department in its antidumping investigations are entitled to *Chevron* deference. *See, e.g., Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372 (Fed. Cir. 2001). There, the court of appeals stated:

> The Supreme Court's recent decision in *Mead* does not change our obligation to afford *Chevron* deference to Commerce's interpretations of ambiguous statutory terms articulated in the course of Commerce's antidumping determinations . . . . The antidumping proceedings conducted by Commerce may of course be fairly

> characterized as 'relatively formal administrative procedure[s] that adjudicate parties' rights. *Mead*, 533 U.S. at __, 121 S. Ct. at 2172.

Id. 1380-82 (alteration in original).

The Department reached its conclusion here in an on-the-record proceeding in the investigation of USEC's antidumping petition, and devoted a specific and separate segment of that proceeding solely to the issue. The Department issued three determinations that addressed that issue—a preliminary and final determination, and then a further decision after remand from the CIT.

The Department's application of the antidumping law to SWU transactions is thus entitled to deference unless the statute "unambiguously forbids" the agency's interpretation, *Barnhart v. Walton*, 535 U.S. 212, 218 (2002), or the interpretation, "for other reasons, exceeds the bounds of the permissible." *Id.* As we discuss in the following sections, the Federal Circuit was plainly wrong to set it aside.

II. THE ANTIDUMPING LAW DOES NOT UNAMBIGUOUSLY FORECLOSE COMMERCE'S CONCLUSION THAT MERCHANDISE IS BEING SOLD IN SWU TRANSACTIONS.

The Federal Circuit found that the Commerce Department's interpretation of the antidumping law ran aground on the first step of the *Chevron* test because, in the court of appeals' view, the word "sold" requires that a "transfer of ownership" take place, and, given

the title-retention provision in the parties' contracts, no such transfer occurs in SWU transactions. But two necessary assumptions underlie this conclusion: *first*, that the Department was required to use a standard commercial definition of "sold," rather than permitted to read the term in light of its statutory context; and *second*, that, even if the term "sold" requires a "transfer of ownership," the Department could not look to the factual realities of SWU transactions—that the enricher takes fungible, undifferentiated feedstock from its inventory and substantially transforms it into a new article of merchandise for delivery to the utility customer, just as it does in an EUP transaction. Instead, the Federal Circuit held that Commerce had to accept, as determinative of whether a transfer had taken place, the parties' contract provision that the customer retains title to the unenriched uranium. Neither assumption is correct.

A. The Department Could Properly Construe The Term "Sold" in Light of the Statutory Context.

The first point is simply that the term "sold," as used in a regulatory statute such as the antidumping law, is not as unambiguous as the Federal Circuit thought it was. The Federal Circuit, relying on one of its prior cases, derived its definition of "sold" primarily from a standard dictionary, *see* USEC Pet. 13a (citing *NSK Ltd. v. United States*, 115 F.3d 965, 975 (Fed. Cir. 1997) (looking to the 1986 edition of *Webster's New International Dictionary*). This Court, however, has emphasized that,

"[i]n making the threshold determination under *Chevron*, 'a reviewing court should not confine itself to examining a statutory provision in isolation.' *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 132, 120 S. Ct. 129, 146 L.E.2d 121 (2000). Rather, '[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context . . . .'" *National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007) (quoting *Brown & Williamson* 529 U.S. at 132-33) (further citation omitted). As the Court observed, "'[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Id.* (quoting *Brown & Williamson*, 529 U.S. at 133 (further internal quotation marks and citation omitted)). *See also Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 127 S. Ct. 1534, 1546 (2007) ("[S]tatutory '[a]mbiguity is a creature not [just] of definitional possibilities but [also] of statutory context.'") (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994)) (**alteration in original**).

This Court has also pointed out that part of the relevant statutory context is the objective that Congress, in setting forth particular statutory language, intends to achieve. Although neither a court nor an agency can just pursue an underlying purpose regardless of the actual words of the statute, *see Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79-80 (1998), it is a familiar principle that statutory terms must be interpreted in accordance with the "'provisions of the whole law, and . . . its object and policy.'" *United States*

Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 455 (1993) (quoting *United States v. Heirs of Boisdoré*, 49 U.S. (8 How.) 113, 122 (1849)); *see also Dada v. Mukasey*, 128 S. Ct. 2307, 2317 (2008). As this Court has observed:

> [W]ords generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at, not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed.

Dist. of Columbia v. Carter, 409 U.S. 418, 420 (1973) (quoting *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253, 258 (1937)).

This Court has followed that principle in construing the term "sale" in other statutory contexts. For example, this Court has found that the words "sale" and "purchase" in the Securities Exchange Act of 1934 should draw their meaning from the statutory setting, stating that "[w]hatever the terms 'purchase' and 'sale' may mean in other contexts . . . [t]he broad anti-fraud purposes of the statute and [related] rule would clearly be furthered by their application to this type of situation." *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453, 467 (1969). Similarly, this Court has found that the phrase "sale in interstate commerce of natural gas" in the Natural Gas Act applies to transactions in which the

pipeline company did not purchase natural gas, but rather leased gas fields and arranged for another company to produce gas from the leased fields. *United Gas Improvement Co. v. Cont'l Oil Co.*, 381 U.S. 392, 399-400 (1965). The Court noted that "[a] regulatory statute such as the Natural Gas Act would be hamstrung if it were tied down to technical concepts of [sale in] local law." *Id.* at 400; *see also Gray v. Powell*, 314 U.S. 402, 403, 416 (1941) (railroad's consumption of coal from its own leased lands constitutes a "sale or other disposal" of coal for purposes of price control provisions of Bituminous Coal Act).

Here, Congress has enacted the antidumping law to address a particular concern: the threat to domestic producers posed by unfairly traded goods produced abroad. As the Federal Circuit has said, "[t]he purpose of the antidumping statute is to protect domestic manufacturing against foreign manufacturers who sell at less than fair market value." *Koyo Seiko Co. v. United States*, 20 F.3d 1156, 1159 (Fed. Cir. 1994); *see also Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1379 (Fed. Cir. 2003) (purpose of the antidumping law is to "equalize competitive conditions between foreign exporters and domestic industries affected by dumping").

The goal of protecting domestic producers of goods from foreign-produced goods that are unfairly traded was identified from the outset of the statute's consideration and through amendments to the statute enacted over the years. The relevant provision of the current antidumping statute traces its roots to the Antidumping Act of 1921, 42 Stat. 11, a post-war era

when Congress was facing the prospect that surplus goods in Europe would be dumped on world markets and "U.S. industries that were important for national security might be damaged."[4] The House Committee Report observed that the proposed law "protects our industries and labor against a now common species of commercial warfare of dumping goods on our markets at less than cost or home value . . . ." H.R. Rep. No. 67-1, at 23 (1921). A half century later, as Congress was in the process of amending the law, the House Report reiterated the same broad objective: "The bill recognizes that . . . those domestic statutes which endeavor to protect our producers from disruptive market penetrations and unfair trade practices must be made more effective if our domestic producing interests are to have confidence in their ability to survive competitively in the United States." *See* H.R. Rep. No. 93-571, at 3 (1973).

Given this purpose of the antidumping law, it is appropriate to believe that Congress, rather than insisting on a narrow definition of the word "sold," desired the Department to possess discretion to apply the statute to injurious import transactions that have the usual characteristics of a sale, even if they do not involve a "transfer of ownership" in the strictest sense. That commonsense view is strongly reinforced by the fact that Congress itself, in a 1984 amendment to 19 U.S.C. § 1673 (Pub. L. No. 98-573, § 602, 98 Stat. 3024),

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[4] *How the GATT Affects U.S. Antidumping and Countervailing-Duty Policy*, Cong. Budget Office 21 (Sept. 1994) (describing history of the antidumping statute and worldwide concerns about dumping between 1920 and 1922).

made clear that the retention of title in transactions involving imported merchandise does not necessarily negate a finding that the transaction involves a sale of merchandise. In that amendment, Congress declared that, "[f]or purposes of this section . . . a reference to the sale of foreign merchandise includes the entering into of any leasing arrangement regarding the merchandise *that is equivalent to the sale* of the merchandise." *Id.* (emphasis added). Thus, even though the hallmark of a lease contract is the lessor's retention of title to the property, the wording of the statute explicitly covers a lease transaction that is "equivalent" to a sale of merchandise. It is therefore evident that Congress was concerned, not just with "sales" in the narrowest sense, but (as the statutory language shows) transactions that are "equivalent to [a] sale" as well.[5]

B. The Department Could Properly Determine That The Transactions Here Involved A Transfer Of Ownership.

Even if the Federal Circuit was correct that merchandise is not "sold" unless there is a "transfer of

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[5] The available evidence indicates that Congress did not view this amendment as a modification to the scope of the antidumping statute, but simply as an explication of its coverage. In form, the amendment explains the meaning of an existing term, rather than expands the coverage. *See* 19 U.S.C. § 1673 ("a reference to the sale of foreign merchandise includes . . ."). The legislative history confirms this reading. *See* H.R. Rep. No. 98-725, at 11 (1984) ("The addition of language regarding leases is intended to clarify the applicability of both laws [the antidumping statute and the countervailing duty statute] to sham leases or leases which are tantamount to sales."), *reprinted in* 1984 U.S.C.C.A.N. 5127, 5138.

ownership," it was wrong to conclude that the Department, in deciding whether such a transfer takes place, is bound to accept the parties' contract provision for the retention of title. Put another way, the term "sold" does not unambiguously bar the Department from exercising its expert judgment—provided, of course, that it is reasonable—to find that the parties' actual course of dealings amounted to a transfer of ownership for purposes of the Act. Rather, in carrying out its duties, the Department may properly look to the substance of a transaction, not just the contract provisions.

This Court has repeatedly recognized that federal courts (and agencies) are not necessarily bound by the form in which parties cast their transactions. For example, in deciding whether a particular instrument falls within the term "security" for purposes of applying the securities laws, the Court has said that "form should be disregarded for substance and the emphasis should be on economic reality." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). Similarly, with respect to tax matters, the Court has observed that various classifications "turn on 'the objective economic realities of a transaction rather than . . . the particular form that the parties employed' . . . ." *Boulware v. United States*, 128 S. Ct. 1168, 1175 (2008) (quoting *Frank Lyon Co. v. United States*, 435 U.S. 561, 573 (1978)). The same is true for laws, like the antidumping act, that protect fair competition. *See, e.g., United States v. Sealy, Inc.*, 388 U.S. 350, 352 (1967) (discussing Section 1 of the Sherman Act) ("[I]f we look at substance rather than form, there is little room for debate . . . . These must be classified as horizontal restraints.").

Nor has this Court allowed technicalities of title to control the reach of federal statutes. In *United Gas Improvement Co.*, 381 U.S. at 392-400, the Court concluded that a transfer of title was not essential to a "sale" under the Natural Gas Act. *See also Gray v. Powell*, 314 U.S. 402 (1941) (rejecting reliance on title in determining the scope of that Act's protection). Likewise, in tax cases, this Court has rejected giving dispositive weight to title, *Frank Lyon Co. v. United States*, 435 U.S. 561, 573 (1978), refusing to permit the transfer of formal legal title to shift the incidence of taxation attributable to ownership of property where the transferor continued to retain significant control over the property transferred. *See also Corliss v. Bowers*, 281 U.S. 376, 378 (1930) ("[T]axation is not so much concerned with the refinements of title as it is with actual command over the property taxed . . . ."). In keeping with these principles, the Second Circuit has remarked that, "where the public interests or the rights of third parties are involved, the relationship between contracting parties must be determined by its real character rather than by the form and color that the parties have given it." *In re Shulman Transp. Enters. Inc.*, 744 F.2d 293, 295 (2d Cir. 1984).

Indeed, in other cases, the Federal Circuit itself has acknowledged that the parties' contractual arrangements regarding title should not necessarily control the application of federal statutes. In *Florida Power & Light Co. v. United States*, 307 F.3d 1364 (Fed. Cir. 2002)—a case involving the categorization of Department of Energy enrichment contracts under the Contract Disputes Act—the court of appeals declined

to give effect to contract provisions that expressly transferred title to the unenriched uranium from the utility to the DOE and then transferred title to the produced LEU from the DOE to the utility. In doing so, the court specifically noted that one of its earlier decisions had treated the title transfer as nothing more than a "'technicality.'" *Id.* at 1373 (quoting *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1355 (Fed. Cir. 2001) (*en banc*)). But, just as a transfer of title can be treated as a technicality, so can provisions deeming title to remain continuous when the course of dealings indicates that, in substance, it does not.

It is true that, in *Florida Power*, the Federal Circuit ultimately concluded that the DOE enrichment contracts before it did not involve "the disposal of personal property" within the meaning of the Contract Disputes Act. *See* 41 U.S.C. § 602(a)(4). But that decision is not instructive here for several reasons. First of all, the Contract Disputes Act and the antidumping law are different statutes with vastly different objectives, making it difficult to extrapolate interpretive principles from one to the other. Even more importantly, however, the *Florida Power* case did not involve any construction of a statute by an expert government agency charged with its implementation. As a result, the Federal Circuit necessarily undertook to resolve the "disposition of personal property" question on the basis of its own judgment, without any need to consider the scope of deference to a different agency interpretation.

It is thus significant for present purposes that, while it decided that no "disposition" of property had occurred,

the court of appeals confessed that it found the question a close one. Believing that a transaction in which the enricher makes LEU from feedstock supplied by a third party would be a "disposition" and that a transaction in which the enricher makes LEU from the very feedstock supplied by the utility would not, the court found that the DOE enrichment contracts before it "do[ ] not fall neatly into either of the above categories . . . ." *Florida Power*, 307 F.3d at 1373. But that is a critical observation. It is in just such cases of uncertain "characterization" that agency discretion should be at its zenith, and judicial displacement of agency judgments at its lowest point. Unless it is clear that SWU transactions do not involve a "transfer of ownership" *in substance*—not just as viewed in light of the "technicality" of the parties own arrangements—the agency interpretation must be given controlling force.

In short, the antidumping act does not forbid the Department from concluding that LEU imported pursuant to SWU contracts is merchandise that is being "sold," regardless of whether the term is limited to a "transfer of ownership" or not. Because "Congress has not directly addressed the precise question at issue," *Chevron*, 467 U.S. at 843, the statute leaves ample room for the agency to apply its expertise. As we discuss next, it has done so in a reasonable manner.

III. COMMERCE REASONABLY CONCLUDED THAT SWU TRANSACTIONS EFFECT A SALE OF MERCHANDISE SUBJECT TO THE ANTIDUMPING LAW.

Commerce reasonably concluded that imports of LEU pursuant to SWU contracts involve a sale of merchandise subject to the antidumping law, rather than a sale of services outside the scope of that law. In reaching this conclusion, Commerce primarily relied upon two key characteristics of SWU transactions: (1) that the enricher substantially transforms raw material (unenriched uranium), into a new and different article of commerce (LEU), and (2) that, because of the fungibility of unenriched uranium, the LEU received by a customer does not derive from the same raw material it provided to the enricher. Commerce determined that, as with import transactions pursuant to EUP contracts, import transactions pursuant to SWU contracts involve the production of a new and different product that is not made from the customer's raw materials—and, hence, do not involve the rendering of a mere "service" on goods provided by the customer that are then returned to the customer. And it reasonably found that, when the enricher transfers that new product to the customer under a SWU contract, it has "sold" that product, just as it does when it transfers LEU under an EUP contract.

A. Substantial Transformation Is The Touchstone In Trade Law For Determining When An Economic Activity Involves The Production Of A New Good.

The Commerce Department, relying on familiar principles of substantial transformation, determined that, in LEU import transactions pursuant to SWU contracts, enrichers produce and sell a new and different article of merchandise covered by the antidumping law, rather than merely providing a service on the customer's goods. In trade law, substantial transformation refers to the "degree of processing or manufacturing resulting in a new and different article," *Certain Carbon Steel Butt-Weld Pipe Fittings from India*, 60 Fed. Reg. 10,545, 10,546 (Dep't Commerce Feb. 27, 1995) (final det.), and the concept is derived from decisions of this Court applying early customs and tariff laws. In *Hartranft v. Wiegmann*, 121 U.S. 609, 615 (1887), for example, the Court held that a tariff on manufactured shells could not be imposed on shells first obtained elsewhere that were polished in England because "[t]hey had not been manufactured [in England] into a new and different article, having a distinctive name, character, or use from that of a shell." In *Anheuser-Busch Brewing Ass'n v. United States*, 207 U.S. 556, 562 (1908), the Court applied the same test to determine whether manufacture of the goods at issue occurred in the United States for purposes of a duty drawback statute.

In applying the antidumping law, Commerce has developed an extensive body of precedent addressing substantial transformation in various industries and circumstances. Commerce makes its decisions on a case-

specific basis,[6] considering factors such as whether the processing results in a change in chemical or physical properties;[7] whether substantial value has been added by the manufacturing or processing operation;[8] and whether the activity is capital and technology intensive.[9] The ultimate objective, as identified by the Court in *Hartranft* more than a century ago, is to determine whether the production or processing has resulted in a "new and different article."[10]

In this case, Commerce found—and no party has ever disputed—that enrichment constitutes substantial

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[6] *Steel Wire Rod from Canada*, 62 Fed. Reg. 51,572, 51,573 (Dep't Commerce Oct. 1, 1997) (prelim. det.); *Certain Carbon Steel Butt-Weld Pipe Fittings from India*, 60 Fed. Reg. at 10,546.

[7] *Steel Wire Rod from Canada*, 62 Fed. Reg. at 51,573.

[8] *Certain Cold-Rolled Carbon Steel Flat Products from Argentina*, 58 Fed. Reg. 37,062, 37,066 (Dep't Commerce July 9, 1993) (final det.).

[9] *3.5" Microdisks and Coated Media Thereof from Japan*, 54 Fed. Reg. 6433, 6435 (Dep't Commerce Feb. 10, 1989) (final det.).

[10] Substantial transformation plays a critical role in the baseline determination—what product is being imported from what country—that must be made in the application of virtually all regimes that govern international trade, such as the application of ordinary customs duties, countervailing duties (to offset foreign subsidies), quota limits, and free-trade agreements. *See* U.S. Customs and Border Protection Headquarters Ruling Letter HQ 563308 (dated Sept. 6, 2005) (giving examples of such regimes).

transformation of the unenriched uranium. *See* USEC Pet. 52a, 62a-63a. It determined that, regardless of the type of contract under which the LEU was imported, the enrichment process involves the manufacture of a new and different good. Commerce rejected the view of enrichment as nothing more than a "service," observing that "[w]hile the term 'enrichment services' is common in the industry, the enrichment of uranium feedstock is no more a 'service,' as that term is normally understood in the international trading community, than a production process that results in the manufacture of textiles, semiconductors, or corrosion-resistant steel." USEC Pet. 63a. It noted that, in each of those examples, a customer could provide the raw materials and merely purchase what might be called a "manufacturing service" from the producer, but concluded:

> Yet, no matter what the purchaser chooses to call the transaction, and no matter what terms may be common in the industry, nothing can change the fundamental facts associated with all of these transactions. In each of these three cases, the purchaser has contracted out for a major production process that adds significant value to the input and that results in the substantial transformation of the input product into an entirely different manufactured product.

USEC Pet. 64a.

Indeed, Commerce's use of substantial transformation, in determining when an import transaction involves a sale of merchandise rather than

a sale of a service, is consistent with the way Congress itself has drawn that line for international trade purposes. In 19 U.S.C. § 2114b(5), Congress set out a definition of "services" for purposes of legislation authorizing the United States Trade Representative to develop and coordinate the implementation of policies concerning international trade in services.[11] Congress defined "services" in § 2114b(5) as "economic activities whose outputs are other than tangible goods" and then provided examples of such activities (*e.g.*, banking, insurance, transportation). Consistent with that language, the Commerce Department concluded here: "We simply do not consider a major manufacturing process to be a 'service' in the same sense that activities such as accounting, banking, insurance, transportation and legal counsel are considered by the international trading community to be services." USEC Pet. 64a.

The reliance by the Department on principles of substantial transformation makes sense in determining when a transaction involves a sale of merchandise because it directly implicates the purpose of the antidumping law: to protect domestic producers of goods from unfairly traded imports of merchandise produced abroad. When merchandise produced abroad is sold at unfair prices and the imports displace U.S. produced goods or otherwise adversely affect the market in the United States, U.S. producers suffer the type of injury

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[11] *See* the International Trade and Investment Act, enacted as Title III of the Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948, 3002, 3005. The measure also amended section 301 of the Trade Act of 1974, 19 U.S.C. § 2411, to make barriers to trade in services actionable under that section.

at which the antidumping statute is directed. Thus, Commerce's focus on substantial transformation is precisely the focus that Congress had in mind in enacting the antidumping law.

B. The Use Of Fungible Raw Materials In Producing A New Good Confirms That A Sale Of Merchandise Takes Place.

Whether or not substantial transformation by itself is enough to establish that transfer of the resulting good to the customer is a "sale" of that good, the reasonableness of treating SWU transactions as sales of merchandise is confirmed by a second element: the imported foreign merchandise is produced from fungible undifferentiated feedstock in the enricher's inventory, not from any raw material actually delivered by the customer. The Federal Circuit acknowledged that the LEU delivered to a utility is not in fact derived from the utility's own feedstock, USEC Pet. 15a, but placed great weight on contractual terms deeming it to be. But deeming does not make it so, and the Department was entitled to look at what actually happens instead.

The Commerce Department made undisputed findings on this issue. In its final determination, Commerce found that "enrichers do not use the uranium feedstock provided by the utility companies. Instead, the natural uranium is typically delivered shortly before, or even after, delivery of the LEU." USEC Pet. 49a. On remand, Commerce again found that "the record indicates that LEU delivered to a utility customer by an enricher under an enrichment contract may be produced before any natural uranium supplied by that

customer could have been part of the production process for that LEU, thereby making it impossible to conclude that the LEU produced and delivered by the enricher is in any way derived from the uranium supplied by the customer." *Id.* 219a. It emphasized that "the record shows that enrichers hold inventories of uranium from various sources, including uranium owned by the enricher itself, and produce LEU without relying solely upon the input from a particular customer." *Id.* 221a.

These findings are not incidental, but rest, in part, on the nature of enrichment. The unenriched uranium from which an enricher produces LEU is fungible with unenriched uranium supplied by other customers or provided by the enricher itself. Equally significant, it is a consequence of the enrichment process that the LEU ultimately delivered to a particular customer cannot be physically traced to the specific batch of unenriched uranium delivered by that customer. In the course of the enrichment process, molecules of U_{235} are continuously recycled through hundred of cascades into a stream of gas that is enriched in U_{235} and a stream that is somewhat depleted in U_{235}. *See* USEC Pet. 105a, 172a; J.A.-40-43.

The contracts reflect this reality. When a customer delivers unenriched uranium to an enricher under a SWU contract, the enricher is given exclusive use and possession of the uranium. *See, e.g.*, C.J.A.-87, 140-41; *see also*, USEC Pet. 105a. The enricher may commingle the customer's feedstock with other unenriched uranium to produce LEU for the enricher's other customers under SWU or EUP contracts. *See, e.g.*, C.J.A.-17. Indeed, not only may the enricher use that unenriched

uranium to produce LEU for any customer, there is no prohibition on the enricher's selling or otherwise disposing of that unenriched uranium. Moreover, the amount of unenriched uranium used in the enricher's production process will frequently be more—or less—than the customer has supplied, depending on whether the enricher is "over-feeding" or "under-feeding" its plant. *See supra* pp. 9-10.

As a consequence, the LEU created by the enricher and delivered to the customer does not in any way constitute the "return" of the customer's raw material in modified form. As Commerce pointed out, a dry cleaner provides a "service" when it returns the customer's suit cleaned, USEC Pet. 53a, but such activity involves neither fungible raw material nor the creation of a new and different article. In the circumstances here, by contrast, Commerce could reasonably conclude that an import transaction constitutes a sale of merchandise under the antidumping law when the foreign producer commingles the raw materials delivered by all of its customers (together with its own unenriched uranium) and then delivers to the customer a transformed product made from those materials.

Early decisions of this Court provide support for that view. For example, in *Powder Co. v. Burkhardt*, 97 U.S. 110 (1877), a customer provided raw material (acids and glycerin) and money to a manufacturer who in turn produced explosives for the customer. While the raw materials were with the manufacturer, they were seized by a third party in execution of a judgment. The question before the Court was whether the raw materials had been sold by the customer to the

manufacturer (and thus could be attached by the third party) or were still owned by the customer under a bailment. The Court explained the underlying law in some detail:

> It is contended that the question of bailment or not is determined by the fact whether the identical article delivered to the manufacturer is to be returned to the party making the advance. Thus, where logs are delivered to be sawed into boards, or leather to be made into shoes, rags into paper, olives into oil, grapes into wine, wheat into flour, if the product of the identical articles delivered is to be returned to the original owner in a new form, it is said to be a bailment, and the title never vests in the manufacturer. If, on the other hand, the manufacturer is not bound to return the same wheat or flour or paper, but may deliver any other of equal value, it is said to be a sale or loan, and the title to the thing delivered vests in the manufacturer. We understand this to be a correct exposition of the law.

Id. at 116. In finding a sale, the Court pointed out that there was

> nothing requiring that the identical acids sent [by the customer] should be used in the manufacture of the explosives, and nothing to prevent an exchange by [the manufacturer] for other materials, if he found any of the

> articles to be unsuitable, or if he found that he had too much of one kind and too little of another, acting honestly in the interest of both parties.

Id. at 117-18.

Almost two decades later, in *Sturm v. Boker*, 150 U.S. 312 (1893), a unanimous Court followed the same principles. Citing to the *Powder Co.* decision, the Court explained that

> [t]he recognized distinction between bailment and sale is that when the identical article is to be returned in the same or in some altered form, the contract is one of bailment, and the title to the property is not changed. On the other hand, when there is no obligation to return the specific article, and the receiver is at liberty to return another thing of value, he becomes a debtor to make the return, and the title to the property is changed; the transaction is a sale.

Id. at 329-30.[12]

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[12] This analysis continues to be applied by courts today. *See, e.g., B.A. Ballou & Co. v. Citytrust*, 591 A.2d 126, 130 & n.4 (Conn. 1991) (quoting *Powder Co.* and concluding that no bailment occurs when a customer supplies fungible raw material to a manufacturer in circumstances where, as a result of the manufacturer's processing activities, "the identity of the item has been destroyed, its nature substantially changed, or value greatly enhanced"); *Sitkin v. R-One Alloys*, No. C.A. PB

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These decisions—which were on the books at the time that Congress enacted the antidumping law— find that a sale occurs where the customer provides raw materials that are commingled and then transformed by the manufacturer into a new good. Those same elements are present in SWU transactions, and the Commerce Department specifically relied upon them in making its determination here that a sale by the enricher occurs upon delivery of the LEU to the customer. Thus, Commerce's conclusion that a sale takes place in a SWU transaction not only implements the purposes of the antidumping law, it tracks longstanding principles recognized in the common law.

C. The Title Retention Provision In The SWU Contracts Did Not Foreclose Commerce's Conclusion That SWU Transactions Effect A Sale Of The LEU.

The foregoing discussion demonstrates the reasonableness of Commerce's determination that delivery of LEU pursuant to SWU transactions effects a sale of LEU by the enricher to the customer, even assuming that a transfer of ownership is necessary for goods to be "sold." The Federal Court, however, assigned "critical importance" to what it viewed as the "indisputable fact" that the enricher never obtains ownership of the LEU. USEC Pet. 29a. It read the

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04-0495, 2006 WL 625273, at *4 (R.I. Super. Ct. Mar. 16, 2006) (sale occurred, irrespective of contract language, because raw material provided by customer commingled with raw material from other customers and transformed into new product).

provision in the SWU contracts that the customer retains title to the unenriched uranium it provided as conclusively determining that any LEU ultimately delivered by the enricher was continuously owned by the customer. To reach this conclusion, the court implicitly accepted the "legal fiction"—as it was characterized by the CIT—that the LEU delivered to a customer is produced from the unenriched uranium provided by the customer.

The record in this case demonstrates the complete unreality of that legal fiction. It shows that an enricher may produce and deliver LEU to a customer under a SWU contract *even before* the customer has supplied the unenriched uranium, USEC Pet. 49a, 219a. The enricher may also fulfill its obligation by delivering LEU produced by *another* enricher. J.A.-229. In each of these cases, there is no factual grounding to the notion that the LEU delivered by the enricher derives in any way from the raw uranium furnished by the customer. Yet it is solely on the basis of that notion that the Federal Circuit found U.S. antidumping law inapplicable to LEU imports pursuant to SWU contracts.

The Department chose to reject that fiction, looking instead to the real nature of the manufacturing process. It pointed out that the "customer does not hold title to the LEU, nor does she hold title to the feed material contained within the recently produced LEU because the LEU produced by the enricher cannot be identified as having been derived from the feedstock provided by any particular customer." *Id.* 219a. As a result, "between the time in which the LEU is produced and the time in which it is delivered as specified under the contract, the

enricher holds title and holds ownership in the complete LEU product." *Id.* Enrichers, in short, "own the LEU, including the rights to sell the LEU to any buyer . . . [and] make a relevant sale when they transfer ownership of the complete LEU to the utilities through the delivery of such merchandise for consideration." *Id.* 219a-220a.[13]

There is nothing exceptional about these agency findings. Although it is true that the Department chose not to give decisive weight to the title-retention provision in the SWU contracts, that refusal is fully consistent with decisions of this Court holding that the parties' arrangements with regard to title are not conclusive for purposes of applying federal regulatory laws. *See supra* pp. 34-35. Indeed, were the rule otherwise, it would lead to the unacceptable result that the parties' agreement regarding the nature of their transaction could conclusively bind agencies and courts as to how the transaction should be characterized under a regulatory statute. *See United Gas Improvement*, 381 U.S. at 399-400; *SEC v. W.J. Howey*, 328 U.S. 293 (1946) (concluding that a

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[13] Eurodif's customary practice is to ship the LEU to the fabricator in the United States and then to deliver the LEU to the customer by directing the fabricator to transfer the requisite amount of LEU from Eurodif's account to the account of the utility customer. *Supra* p. 11. USEC Pet. 230a, C.J.A.-475, 505 (other relevant provisions in contracts with fabricators). Until it delivers the LEU to a particular customer, the LEU is not identified to any particular utility contract, and the enricher is free to deliver the LEU to any customer or dispose of it in its discretion. Thus, in reality, the enricher, as opposed to any particular customer, owns the undelivered LEU, as Commerce found.

transaction structured as a sale of real estate and services could instead be viewed by the agency as a sale of an investment contract).

Moreover, even in the commercial context, courts often give only limited effect to title retention provisions, particularly as they may affect the rights of third parties. Thus, for example, when title retention provisions are used in processing or contract manufacturing transactions, some courts have held that a sale to the processor, or the acquisition of ownership rights by the processor, has nevertheless taken place so as to protect the processor's creditors. *See Morton Booth Co. v. Tiara Furniture Inc.*, 564 P.2d 210 (Okla. 1977) (finding sale of goods when goods sent to processor, despite supplier's retention of title in goods, because title retention provision merely established security interest in goods); *Kinetics Tech. Int'l Corp. v. Fourth Nat'l Bank*, 705 F.2d 396, 400-402 (10th Cir. 1983) (same); *In re Bristol Indus.*, No. 1-81-01028, 1981 WL 138044 (Bankr. D. Conn. Dec. 14, 1981) (finding retention of title was evidence only of a "security device" rather than a bailment and finding a sale of goods in processing context), *rev'd on other grounds*, 690 F.2d 26 (2d Cir. 1982). *See also* William D. Harrington, *A Caveat for Commodity Processing Industries: Insolvent Processors' Creditors vs. Putative Owners of Raw Materials*, 16 UCC L.J. 322 (1984).[14]

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[14] The same emphasis on substance may be found in the area of mortgage financing, where the person who holds title to real property may not be the real "owner." While many states use liens to secure financing, a minority still follow early English common law and provide that a homeowner provides

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As discussed above, *supra* pp. 32-33, in its 1984 amendment to the antidumping statute, Congress itself made clear that the retention of title to goods in a lease is not determinative of whether the transaction should be treated by Commerce as a sale of goods for purposes of the antidumping law. In 1988, Congress took the further step of identifying the factors, in addition to the terms of the lease itself, that Commerce should consider in determining whether a particular lease was equivalent to a sale. Those factors include "commercial practice within the industry," "the circumstances of the transaction," and "other relevant factors, including whether the lease transaction would permit avoidance of antidumping or countervailing duties." *See* 19 U.S.C. § 1677(19). In this case, Commerce considered those same factors in concluding that SWU transactions constitute a sale of merchandise despite the title retention provisions in the parties' SWU contracts.[15]

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security for the mortgage by transferring title to the lender, to a nominee of the lender, or to a trustee designated by the lender. *See Powell on Real Property* § 37.03 (Michael Allan Wolf ed., 2000). In these "title theory" states, which include Virginia, the District of Columbia, and Maryland, the lender or trustee under a deed of trust holds the title as security for the repayment of the loan. "Today . . . title jurisdictions differ in only a few respects from their lien theory counterparts. Such states recognize that mortgagees hold title for security purposes only, and for both practical and theoretical purposes they usually view the mortgagor as the owner of the land." Restatement (Third) of Property (Mortgages) § 4.1 cmt. a, at 185 (1997).

[15] The 1984 amendment to § 1673 was consistent with case law disregarding title-retention provisions in determining that
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The view taken by the Department does not mean, of course, that the parties' contractual treatment of title is irrelevant in all contexts. Their private arrangement may serve various purposes, such as determining their rights vis-a-vis each other, allocating the obligation to pay property taxes on the unenriched uranium, or securing the performance of the other party's obligations. Here, for example, the customer's retention of title to the quantity of feed material that it delivers secures the performance of the enricher in delivering the LEU. But such provisions do not necessarily determine where ownership of the property may lie—and certainly not where the rights of third parties or the public may be at stake.

It is also evident that blind reliance on a contract provision about who holds "title" to the unenriched uranium would lead to results that are clearly contrary to the proper administration of the antidumping law. For example, it would mean that a utility could simply purchase unenriched uranium from the enricher's own inventory via a book transfer, immediately "provide" it to the enricher to fulfill its obligations under a SWU contract, and then claim that it had continuously "owned" the LEU delivered to it. Alternatively, to meet its obligations under the SWU contract, a utility could ask the enricher to purchase uranium on its behalf but

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a transaction was in reality a sale, not a true lease. *See, e.g., Citi-Lease Co. v. Entm't Family Style, Inc.*, 825 F.2d 1497, 1500-01 (11th Cir. 1987) (rejecting a title-retention provision as determinative of whether the transaction was a lease); *Orix Credit Alliance, Inc. v. Pappas*, 946 F.2d 1258, 1263 (7th Cir. 1991) (same).

to maintain title in the utility. Indeed, even an EUP contract could be converted into a sale of services just by deeming the customer to have "title" to the raw materials used by the enricher in producing the LEU.

The problem, in fact, would go well beyond the particular circumstances of producing enriched uranium. Foreign producers and their U.S. customers could potentially restructure any transaction for the sale of merchandise into a sale of the raw materials and a sale of the production of the finished product. So long as the contracts provided that title to the raw material remained with the customer, they could assert that the contract for the production of the finished merchandise is only a contract for the sale of services outside the antidumping law. In effect, the parties' own contract provisions would determine the scope of the law.

These undesirable consequences would all arise from a rule that a title-retention provision with regard to fungible raw materials provided by a customer conclusively dictates that the customer, not the manufacturer, owns the finished product prior to its delivery to the customer. Commerce, in applying the antidumping statute, was clearly not compelled to adopt this view of that provision or to adopt the "legal fiction" that the courts below derived from it. Its judgment thus was reasonable and should have received deference.

IV. THIS CASE ILLUSTRATES WHY COMMERCE'S CONSTRUCTION ADVANCES THE PURPOSES OF THE ANTIDUMPING LAW.

If the antidumping law is not given the construction provided by Commerce, it will fail to achieve its basic purpose of protecting U.S. manufacturing industries from the threat of unfair foreign competition. The nature and vital importance of that risk are vividly illustrated by the facts of this case.

USEC, created through privatization of an arm of the U.S. government, is the sole domestic entity that produces enriched uranium. It is also the only entity that employs U.S. enrichment technology, free of restrictions that encumber all other available sources of enriched uranium for the military needs of the United States. Petition of the United States at 30-31. Today, USEC is the sole supplier of LEU used to fuel the government-owned nuclear reactors that produce tritium, a radioactive isotope necessary to maintain the U.S. nuclear arsenal. In the future, as current stocks of highly enriched uranium needed for the U.S. Navy's nuclear-powered submarines and aircraft carriers are depleted, the Defense Department will need a domestic source of enriched uranium produced with U.S. technology to supply its needs. *Id.* Today, and for the indefinite future, USEC is the only domestic company that employs uranium enrichment technologies available to meet U.S. defense needs.

Unfair import competition can cause great economic injury in the enrichment industry. The number of customers for enriched uranium is limited. Where a

foreign entity, perhaps one owned by a foreign government, dumps enriched uranium in the United States, a domestic enricher like USEC faces great difficulties in selling its product. It faces either a loss of sales or a decline in price or both.

The International Trade Commission has found that imports of LEU from France have caused, or threaten to cause, material injury to the domestic enrichment industry.[16] Indeed, the threat to USEC is even more dire than the prospect of unlimited imports of French LEU under SWU contracts. Imports of LEU from Russia are currently limited because of a 1992 agreement arising out of an antidumping case against Russian uranium products. The CIT has insisted that the holding of the Federal Circuit in this case, exempting French SWU transactions from the coverage of the antidumping law, must also be applied with respect to imports of LEU from Russia pursuant to SWU transactions. *Supra* pp. 18-19.

This prospect greatly expands the potential for injury to USEC and any future domestic enrichment

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[16] In December 2007, the Commission, in its five-year updated review of its original injury determination, concluded that, "if the order on LEU from France were to be revoked, the likely significant increase in the volume of subject imports, coupled with the likely adverse price effects, would likely have a significant negative impact on the domestic industry in terms of output, sales, market share, profits, productivity, return on investments, utilization of capacity, cash flow, inventories, employment, wage growth, ability to raise capital, [and] investment . . . ." *Low Enriched Uranium From France*, Inv. No. 731-TA-909 (Review), USITC Pub. No. 3967, at 33 (Dec. 2007), *available at* http://hotdocs.usitc.gov/docs/pubs/ 701_731/ pub3967.pdf.

company. Russia is the largest enricher of uranium in the world, it has substantially more enrichment capacity than is necessary to supply its own domestic market, and, absent constraints imposed by the antidumping law, it would likely target the U.S. market with significant volumes of LEU. *See Uranium From Russia*, Inv. No. 731-TA-539-C (Second Review), USITC Pub. No. 3872, at IV-16, 28 (Aug. 2006) ("*Uranium From Russia*").[17] The impact on the U.S. enrichment industry resulting from the absence of such constraints would essentially be the same as if the suspension agreement were terminated. The International Trade Commission concluded that the termination of the suspension agreement would likely lead to a "significant increase" in "aggressively priced" LEU imports from Russia that would "significantly depress or suppress the domestic industry's prices. . . . We find that these developments would likely have a significant adverse impact on the production, shipments, sales, market share, and revenues of the domestic industry, particularly given its vulnerable condition." *Id.* at 34.[18]

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[17] The report is *available at* http://hotdocs.usitc.gov/ docs/ pubs/701_731/pub3872.pdf.

[18] As discussed more fully in the petitions of the United States and USEC, the market distortions created by a loophole in U.S. antidumping laws would not only create an incentive for the Russians to flood the U.S. market with their commercial uranium, but would also discourage them from dismantling the nuclear arsenal of the former Soviet Union through the relatively more expensive process of down-blending their weapons-grade uranium. United States Pet. 25-30; USEC Pet. at 33-35.

The threat of significant imports of Russian LEU under SWU contracts outside the scope of antidumping discipline could not only undermine USEC's plans to create new enrichment capacity in the United States, but could well undermine or limit the plans for other new enrichment plants. USEC has announced plans to build a new multi-billion dollar enrichment plan under its 2002 Memorandum of Understanding with the United States Department of Energy. Another entity, known as "LES", is also building an enrichment facility in New Mexico (using European, not U.S., technology). Removal of the restrictions that the antidumping law provides against unfairly priced LEU imports could undermine both endeavors, by making it difficult to sell their output or raise capital.[19]

Thus, in the absence of effective enforcement of the antidumping laws, an industry vital to the defense of the nation, the U.S. uranium enrichment industry, faces a serious threat from foreign imports of LEU. It was precisely to avoid threats of that kind that Congress, almost a century ago, enacted the antidumping law. *Supra* pp. 32-33. Congress has placed the Commerce Department in the pivotal role of applying the antidumping law, and the Federal Circuit has recognized that Commerce is the "master" of that law. *Supra* p. 27. Where, as here, Commerce reaches a

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[19] *Uranium From Russia* at 34 ("The likely significant volume of imports from Russia at aggressive prices would also threaten the viability of the two new enrichment facilities being planned in the United States, USEC's 'American Centrifuge' facility and LES's 'National Enrichment Facility,' without at least one of which the U.S. industry will be increasingly marginalized by its old and uneconomic technology.").

construction that is consistent with the language of the antidumping law, will facilitate the purposes of that law, and is entirely reasonable in light of the economic realities of the transactions, that construction should govern.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Federal Circuit should be reversed.

Respectfully submitted,

Of Counsel:

PETER B. SABA
General Counsel
JAMES A. SCHOETTLER, JR.
Assistant General Counsel USEC Inc.

H. BARTOW FARR III
FARR & TARANTO
1150 18th Street, N.W.
Suite 1030
Washington, D.C. 20036

SHELDON E. HOCHBERG
Counsel of Record
ERIC C. EMERSON
CHARLES G. COLE
MICHAEL A. VATIS
JOHN P. NOLAN
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

Attorneys for Petitioners USEC Inc. and United States Enrichment Corporation